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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 189

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,
Petitioner,

v.

UNITED TRANSPORTATION UNION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court is not reported; it appears as Appendix C (pp. 22a-29a) to the Petition. The opinion of the Court of Appeals for the Seventh Circuit appears as Appendix A, (pp. 1a-20a) to the Petition and is reported at 422 F. 2d 979.

JURISDICTION

The jurisdictional requisites adequately appear in the Petition.

QUESTION PRESENTED

Whether, after the procedures required by Sections 5 and 6 of the Railway Labor Act, 45 USC 155, 156, with respect to a dispute between a railroad and the representative of its employees over a proposed change in their collective agreement for notice of the proposed change, negotiation and mediation by the National Mediation Board have been exhausted, a justiciable issue exists under the provisions of Section 2, First of the Railway Labor Act, 45 USC 152, First, with respect to whether a party to the dispute made every reasonable effort to settle it in negotiation and mediation, notwithstanding the absence of any provision of the Railway Labor Act for judicial determination of such issue as a condition to the exercise of self-help by such party after and notwithstanding exhaustion of the procedures required by the Railway Labor Act.

STATUTES INVOLVED

The provisions of the Transportation Act of 1920, ch. 91, Title III, § 301, 41 Stat. 456; the Railway Labor Act of 1926, ch. 347, §§ 2, First, 2, Second, 2, Third and § 5, First, 44 Stat. 577; the Norris-LaGuardia Act of 1932, ch. 90, §§ 4, 7, 47 Stat. 70 (now 29 USC, §§ 29 USC 104, 107); the Railway Labor Act of 1934, ch. 691, §§ 2, First, Second, Third, Fourth, Ninth and 5, First, 48 Stat. 1185 (now 45 USC 152 First, Second, Third, Fourth, Ninth and 155 First), *amending* the Railway Labor Act of 1926, 44 Stat. 577; the Labor Management Relations Act of 1947, ch. 120, §§ 2(2), 2(3), 8(a)(5), 8(b)(3), 8(d), 10(b), 10(j), 10(k), 10(l), 61 Stat. 136 (now 29 USC, §§ 152(2), 153(3), 158(a)(5), 158(b)(3), 158(d), 160(b), 160(j), 160(k), 160(l), *amending* Labor Management Relations Act of 1935, 49 Stat. 449 are set forth in Appendix A.

STATEMENT

This case arises in the continuation of a dispute which has existed for more than ten years between Petitioner, the Chicago & North Western Railroad Company, hereinafter "CNW" and Respondent, United Transportation Union, the successor of the Brotherhood of Railroad Trainmen, hereinafter "Union", with respect to the number of persons to be employed in crews (other than engine crews) in train, road or yard service. The dispute has been and continues to be known as the "crew consist" dispute. It has been and is separate from a co-existing dispute involving the employment of firemen on diesel engines.

The dispute commenced on November 2, 1959, when CNW, as one of approximately two hundred railroads, served notices under the provisions of Section 6 of the Railway Labor Act, 45 USC 156, upon each of the five unions which were the representatives under the Railway Labor Act of the railroads' employees in engine, train and yard service, including the Brotherhood of Railroad Trainmen, which was the representative of employees in train and yard service. The railroads' notices proposed, *inter alia*, eliminating every existing requirement for the employment of a stipulated number of persons in train and yard crews and an agreement for management to have unrestricted right to determine the number and craft of persons to be employed in train and yard service crews. (Presidential Railroad Commission Report of February 26, 1962, hereinafter PRC (App. B, pp. 519-21) Transcript, hereinafter Tr., 226-231).

On September 7, 1960, the unions representing train and yard service employees, including the BRT, served upon each of the railroads which had served notice on the union on November 2, 1959, a notice which, as later implemented, proposed an agreement that crews in road

service should consist of not less than a conductor and two trainmen and that crews in yard service should consist of not less than a fireman and two helpers. (PRC p. 534; Tr. 227-228.) These conflicting proposals constitute the "crew consist" dispute.

In pursuance of an agreement between the railroads and the five unions by and upon which the notices were served, the dispute between the representative of each union on each railroad was referred to a committee representing each union and by each railroad to a committee representing all the railroads, to be, as they were, handled collectively and concurrently by such committees on a national basis.

At the request of the parties, the President created the Presidential Railroad Commission on November 1, 1960 to study and report upon the aforementioned crew consist and other proposals contained in the railroads' 1959 and the unions' 1960 Section 6 notices. The PRC made its Report and recommendations on February 28, 1962. (PRC, p. iv; see also *National Mediation Board* (sometimes hereinafter NMB), Twenty-ninth Annual Report, June 30, 1963, p. 14).

Negotiations between the railroads' committee and the unions' committee from February until May 17, 1962, in the light of the Report of the PRC, did not result in an agreement and, on May 21, 1962, the unions invoked the services of the National Mediation Board. Mediation was conducted by the NMB from May 23 to June 22, 1961 but did not result in an agreement resolving the dispute or for arbitration and the NMB terminated its jurisdiction of the dispute on August 15, 1962, notifying the parties that "[i]t is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement", and directing the attention of the

parties to the status quo clause of Section 5 First (b) of the Act. (NMB, 29th Annual Report, 1963, p. 15.)

The unions then filed *Brotherhood of Locomotive Engineers, et al. v. Baltimore & Ohio R. Co., et al. infra,* for an injunction against the railroads' exercise of self-help by putting their November 2, 1959 notices into effect on the ground the railroads' notice of November 2, 1959, proposing the *elimination* of crew consist agreements, was in violation of Section 2, First of the Railway Labor Act which provides that carriers and their employees shall make every reasonable effort *to make and maintain agreements.*

The District Court dismissed the action; the Court of Appeals affirmed, 310 F. 2d 503 (7th Cir., 1962) as did this Court, ruling that the parties were free to exercise self-help subject only to the creation of an emergency board (372 U. S. 284, 291 (1963)).

The railroads, including the CNW, again announced their intention to exercise self-help, as authorized by this Court's decision, and to put their November 2, 1959 proposal into effect on April 8, 1963 and the unions announced they would strike. Thereupon, the President established Emergency Board No. 154 which made its report May 13, 1963 (NMB, 29th Annual Report, June 30, 1963, pp. 15, 51).

Further negotiations were unsuccessfully conducted under the auspices of the Secretary of Labor and the President (NMB, 29th Annual Report, June 30, 1963, pp. 15-16), after which Public Law 88-108, 77 Stat. 132, 45 U. S. C. 157 (1970 Supp.)) was enacted. It prohibited the exercise of self-help by the railroads and unions and required the arbitration of the firemen and crew consist disputes.

Arbitration Board No. 282, which was created pursuant to Public Law 88-108, after conducting hearings, made an award which became effective January 25, 1964.

The award remanded the crew consist dispute to the individual railroads and representatives of the unions on each such railroad for resolution by agreement or by arbitration by Special Boards of Adjustment in accordance with certain guidelines (Pl. Ex. 1, Tr. 27-28).

The validity of the Award was upheld in *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Chicago, Burlington & Quincy R. Co., et al.*, 225 F. Supp. 11 (D. D. C. 1964) in which the court reviewed the developments of the dispute; the Court of Appeals affirmed, *per curiam*, on the basis of the opinion of the District Court, *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Certain Carriers, etc.*, 331 F. 2d 1020 (D. C. Cir. 1964), and this Court denied certiorari, *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Certain Carriers, etc.*, 377 U. S. 918 (1964).

During the two years prior to the expiration of Arbitration Award No. 282 on January 25, 1966, the crew consist dispute was resolved in many instances by agreements between individual railroads and the unions and, on other railroads, by arbitration by Special Boards of Adjustment; the dispute was resolved by agreement on some districts of the CNW and by arbitration on others (Tr. 225-226).

The effect of the agreements and arbitration awards was generally to authorize reduction in the number of persons required to be employed in crews (NMB, 30th Annual Report, 1964, p. 76; 31st Annual Report, 1965, p. 65; 32nd Annual Report, 1966, p. 772; Tr. 225-226).

The unions, taking the position that, upon the expiration of the Award of Arbitration Board No. 282, the crew

consist agreements and practices which were in existence prior to the Award would again be in effect, called upon the railroads to prepare to put these prior agreements and practices into effect on January 25, 1966. Also, in June and July 1965, the unions served notices upon about 170 railroads under the provisions of Section 6 of the Railway Labor Act proposing an agreement to become effective at the expiration of the Award on January 25, 1966 for a minimum crew consist of a conductor and two trainmen in road service and a foreman and two helpers in yard service, which was the same as the notice the unions had served in 1960; the union's notice was served on the CNW July 6, 1965 (Tr. 226-228, 231). The CNW and other railroads upon which the union served the same notice refused to negotiate with the union with respect thereto upon the ground that the notice, having been served during the effective period of the Award of Arbitration Board No. 282, was without legal effect. The unions then invoked the services of the National Mediation Board (Tr. 383).

In December, 1965, the CNW and other railroads served notices on the union which were the same as those served by the railroads in 1959 (Tr. 226-231), proposing an agreement for management to have the unrestricted right to determine the number and craft of persons to be employed in crews. The CNW and other railroads which served the same notice also proposed that the dispute arising from the union's notice and the railroads' notice be handled concurrently by a Committee representing all the railroads and a committee representing the union's representative on each railroad as had been done with respect to the notices served by the railroads in 1959 and by the unions in 1960. The unions did not agree to the railroads' proposal to handle the dispute on a national basis (Tr. 233), whereupon the railroads also invoked the services of the National Mediation Board and urged it to handle the disputes concurrently on a national basis, rather than on a

local basis (Tr. 385-388). The National Mediation Board took jurisdiction of the disputes and proceeded to handle the disputes on a railroad by railroad basis, rather than on a national basis, as urged by the railroads (Tr. 390-391); *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co.*, 383 F. 2d 225, 227 (D. C. Cir., 1967). The CNW and the union had one conference with respect to the crew consist dispute on January 18, 1966 (Tr. 231, 403).

On January 21, 1966, the CNW and other railroads, upon which the union had served notices and which had served notices upon the union (Tr. 391, 393) filed *Akron & Barberton Belt Railroad Company et al. v. Brotherhood of Railroad Trainmen et al., infra*, seeking a declaratory judgment with respect to the rights of the parties subject to the Award of Arbitration Board No. 282 after the expiration thereof and for an anti-strike injunction. On May 19, 1966, the District Court held that Section 6 notices served during the effective period of Arbitration Award No. 282 would become effective on January 25, 1966, after which full fledged conferences must be held to satisfy the requirements of the Railway Labor Act, but declined to issue any order interfering with proceedings of the NMB (254 F. Supp. 306, D. D. C. 1966).

Thereafter the CNW and the Union conferred with respect to the dispute arising from their notices on June 28, 1966 and again in August, 1966 (Tr. 233-234, 403).

While appeals from the judgments of the District Court in *Akron & Barberton Belt* were pending, the National Mediation Board, on October 4, 1966, terminated its jurisdiction over disputes which arose from crew consist notices served in 1965 by the union on the Atlantic Coast Line Railroad Company, the Boston & Maine Railroad Company and the Des Moines Union Railroad Company and

by those railroads on the unions, which were substantially the same as the notices served by and upon the CNW and the union in 1965 (Tr. 396-398).

On November 1, 1966, those railroads instituted *Atlantic Coast Line Railroad Company et al. v. Brotherhood of Railroad Trainmen*, in the U. S. District Court for the District of Columbia, seeking a declaratory judgment that the union had not exhausted the requirements of the Railway Labor Act because it had refused to agree to national handling of the disputes which arose from the Section 6 notices served by the union in June and July 1965 and by the railroads in December, 1965, and that the unions had not bargained in good faith as required by Section 2, First of the Railway Labor Act.

On May 12, 1967, the Court of Appeals for the District of Columbia Circuit decided *Brotherhood of Railroad Trainmen et al. v. Akron & Barberton Belt R. Co. et al.*, 385 F. 2d 581, affirmed, in part, and reversed, in part, the District Court's decision as shown, *infra*.

On September 6, 1967, the Court of Appeals for the District of Columbia Circuit decided *Brotherhood of Railroad Trainmen v. Atlantic Coast Line R. Co.*, 383 F. 2d 225, reversing the decision of the District Court, as shown, *infra*.

During the period from the initiation of the *Atlantic Coast Line* suit in October, 1966 until after both the *Akron & Barberton Belt* and the *Atlantic Coast Line* litigation had been completed—when this Court denied Petitions for Writ of Certiorari in both cases in January, 1968 (389 U. S. 1047 and 390 U. S. 923)—no meetings or conferences were held between the CNW and the unions with respect to the dispute arising from their 1965 notices and the National Mediation Board, which had retained jurisdiction over the CNW crew consist dispute, held the matter in abeyance (Tr. 234).

Following a meeting on March 19, 1968, between the Presidents of the CNW and the Union, the parties engaged in negotiations on May 16, June 12, June 20, July 17, August 6 and 7, 1968 (Tr. 239-240, 243, 244-246, 248-249). No negotiations were conducted from August 7, 1968 until April 22, 1969 because the parties were involved in matters connected with a merger of the CNW and other railroads (Tr. 254-255). Further negotiations occurred on April 22 and 30, 1969, May 9 and 15, 1969 (Tr. 254, 256, 260, 263, 268, 270); they were conducted for the Union by numerous General and Local Chairmen and for the CNW by its Vice-President for Labor-Relations, J. R. Wolfe.[1]

The National Mediation Board actively, but unsuccessfully, undertook to mediate the dispute on 8 separate occasions between June 4 and July 2, 1969 (Tr. 275-276, 280, 290, 303-308), and on October 16, 1969, after rejection of a proposal by the National Mediation Board to submit the dispute to arbitration, terminated its jurisdiction over the CNW-UTU "crew consist" dispute (Court of Appeals Opinion, *infra*, p. 5a; Tr. 312; Def. Exhibit 7, Tr. 433), notifying the parties that "[i]t is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement," and directing the attention of the parties to the status quo clause of Section 5 First (b) of the Act (Def. Exhibit 7, Tr. 433).

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[1] CNW Vice-President Wolfe had been intimately involved with the "crew consist" dispute from its beginning in 1959, as one of the Southeastern Railroad's counsel in national labor cases from 1959 to 1964, and as General Attorney and, subsequently, as General Counsel of the National Railway Labor Conference, the national bargaining arm of the railroads, from July, 1964 until election as CNW Vice-President for Labor Relations in April, 1968 (Tr. 218, 219, 376-77, 381, 406). From his election as CNW Vice-President for Labor Relations in 1968, to the time of the filing of this suit, Mr. Wolfe has been personally involved in "crew consist" negotiations involving CNW and the UTU (Tr. 406-08).

Thereafter, the CNW and Union negotiated further and exchanged proposals for the settlement of the dispute for seven consecutive days from November 12 to 19, 1969 without reaching agreement (Tr. 314-318).[2]

On November 19, 1969, CNW commenced this action for a declaratory judgment and for an injunction against a strike by the union over the dispute on the ground the union had not made the "every reasonable effort" contemplated by Section 2, First, of the Railway Labor Act, to make an agreement. The alleged failure of the union was (1) insisting upon handling the dispute with the CNW separately from the same dispute it had with other railroads rather than concurrently with such other disputes on a national basis; (2) refusing to bargain over the number of persons to be employed in main line crews; (3) insisting upon an agreement which would not be more favorable to the CNW than agreements made by the union with other railroads (Complaint, pp. 4-5) as amended November 28, 1928.

The District Court granted a temporary restraining order and CNW filed a motion for a preliminary injunction. The union on December 2, 1969, filed an answer to the CNW's complaint as amended, asserting that the complaint did not state a claim upon which relief could be granted; that the Court lacked jurisdiction under the Railway Labor Act and Norris-LaGuardia Act to grant the relief sought by CNW; that CNW had not, as determined in *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, made every reasonable effort to resolve the

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[2] The negotiations between CNW and the union were conducted in the setting of the industry-wide trend of agreements resolving the crew consist dispute of which CNW's J. R. Wolfe had general knowledge and which appear in Defendant's Exhibit 8, Tr. 338-339 and specific knowledge of agreements resolving the crew consist dispute between the union and at least 23 railroads operating in the same areas in which the CNW operates (Tr. 340-343, 371-372).

dispute, that the CNW's claim that the union had violated the Railway Labor Act by insisting upon handling its dispute with CNW separate from the same dispute with other railroads, rather than on a national basis had been judicially resolved against the CNW's contention in *Atlantic Coast Line R. Co. et al. v. Brotherhood of Railroad Trainsmen, infra*, and otherwise denied that it had failed to comply with the Railway Labor Act in its negotiation with the CNW with respect to the dispute.

After hearing evidence, the District Court granted the union's motion to dismiss the action (Ptn. App. C, pp. 22a-29a).

Also, on the same day, the District Court issued an injunction against a strike by the union pending an appeal which is the subject of *United Transportation Union, Petitioner v. Chicago & North Western R. Co., Respondent*, No. 190, now pending in this Court.

On March 6, 1970 the Court of Appeals affirmed the decision of the District Court (Ptn. App. A, pp. 1a-20a, 422 F. 2d 979), concluding that "§ 2, First does not contemplate judicial enforcement of its 'reasonable effort' requirement . . ." (Ptn. App. A, p. 13a); rather the "role of the [National] Mediation Board under the Railway Labor Act requires [that Board] and not the judiciary to enforce compliance with § 2, First" (Ptn. App. A, p. 16a).

SUMMARY OF THE ARGUMENT

The writ of certiorari should not be granted because:

I. The Court below correctly decided that, after the requirements of the Railway Labor Act for notice, conference and mediation by the National Mediation Board have been exhausted, and no Presidential Emergency Board has been

established with respect to a major dispute arising under the Act, Section 2, First, of the Act, which provides that it shall be the duty of carriers and their employees to exert every reasonable effort to make agreements, is not justiciable and does not confer jurisdiction upon the courts to determine (as the National Labor Relations Board has jurisdiction to determine under the Labor Management Relations Act) upon evidence of the conduct of the parties in exhausting those requirements, whether a party to such dispute complied with Section 2, First, of the Act and, depending upon such judicial determination, to permit a party to such dispute to exercise its right of self-help with respect to the dispute or, in the case of a union, to deny the exercise of self-help by an anti-strike injunction until the union, to the satisfaction of the court thereafter, shall have complied with Section 2, First, of the Act by engaging in either re-negotiation or re-mediation by the National Mediation Board or, in a case in which an investigation has been made of the dispute by a Presidential Emergency Board, by re-participating in a re-investigation of the dispute by a re-established Emergency Board.

II. There is no conflict between the decision of the Court below and the decision of the Court of Appeals for any other Circuit or by a District Court on the same matter, but at most only with *obiter dictum* in opinions in other cases or with the fact that a court conducted such proceedings without deciding the question decided by the Court below.

III. The decision of the Court below that the determination of whether the parties to such a dispute have complied with Section 2, First, of the Act should be left to determination by the National Mediation Board rather than by the Courts, does not present an important question of federal law which has not been, but should be, decided by this Court, nor a conflict with any decided case

but is clearly in accord with the long established and accepted view that such is the function of the National Mediation Board under the Railway Labor Act and its decision that all practical methods provided by the Act for adjusting the dispute have been exhausted, should be given the same force and effect as decisions by that Board with respect to what employees constitute a craft or class and the designation of a representative by a majority of such employees and should not be subject to judicial review.

ARGUMENT

I

The Decision of the Court Below Was Correct

Section 2, First of the Railway Labor Act, as amended by the Act of June 21, 1934, c. 691, § 2, 48 Stat. 1185; 45 USC 152, First (App. A-1), upon which Petitioner bases its claim in this case, first appeared in railway labor legislation in substantially the same words as Section 301 of Title III of the Transportation Act of February 28, 1920, c. 91, § 301, 41 Stat. 456 (App. A-1), thereafter in substantially the same words as Section 2 of the Railway Labor Act of May 20, 1926, c. 347, § 2, 44 Stat. 577 (App. A-1). It provides that:

> ". . . It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

It was held not to impose any judicially enforceable obligation upon either the railroads or their employees when it was first considered in *Pennsylvania R. Co. v. United States Railroad Labor Board*, 261 U. S. 72 (1922), in *Pennsylvania Railroad System & Allied Lines Federation No. 90 v. Pennsylvania R. Co.*, 267 U. S. 203 (1925) and in *Brotherhood of Railway & Steamship Clerks v. Pennsylvania R. Co.*, 267 U. S. 219 (1925).

The use of company unions by the railroads contributed to the strike in 1922 by the shop craft employees which

developed into a national strike of not only shop craft employees but employees in other crafts, contributed to the failure of the Transportation Act of 1920 and the enactment of the Railway Labor Act of 1926. L. Lecht, *Experience under Railway Labor Legislation*, BNA, 1969, pp. 43-46.

Section 2 of the Railway Labor Act of May 20, 1926, c. 347, § 2, 44 Stat. 577, was substantially the same as Section 301 of the Transportation Act of 1920 (App. A-1) but the Railway Labor Act of 1926 added Section 2, Third (App. A-2) to provide that:

> "Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

The Railway Labor Act of 1926 was considered by this Court in *Texas & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548 (1930). In that case, the railroad caused a company union, the "Association of Clerical Employees-Southern Pacific Lines" to be organized and to cause its clerical employees to substitute it for the Brotherhood as their representative; at that time a wage dispute between the railroad and the Brotherhood was subject to the jurisdiction of the Mediation Board. Thereafter the Railroad refused to deal with the Brotherhood, claiming it did not represent a majority of the clerical employees. The Brotherhood sued for an injunction prohibiting the Railroad from interfering with, influencing or coercing its clerical employees in the matter of their organization and designation of representatives in

violation of Section 2, Third of the Act. The Railroad's contention, based on the *Pennsylvania Railroad* cases, that the Act provided no judicially enforceable duty was rejected by this Court stating (281 U. S. at 567-568):

> "It is thus apparent that Congress, in the legislation of 1926, while elaborating a plan for amicable adjustments and voluntary arbitration of disputes between common carriers and their employees, thought it necessary to impose, and did impose, certain definite obligations enforceable by judicial proceedings. The question before us is whether a legal obligation of this sort is also to be found in the provisions of subdivision third of Section 2 of the Act, . . ."
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> *"It is at once to be observed that Congress was not content with the general declaration of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules, and working conditions, and to settle disputes with all expedition in conference between authorized representatives, but added this distinct prohibition against coercive measures. . . ."*

Thus, this Court continued to regard "the general declaration [in Section 2, First and Section 2, Second] of the duty of carriers and employees to make every reasonable effort to enter into and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes with all expedition in conferences between authorized representatives" which it held in the *Pennsylvania Railroad* cases, was not a judicially enforceable duty and was different from the *distinct prohibition* of Section 2, Third which it held judicially enforceable and thus laid the foundation for determining what provisions of the Railway Labor Act are justiciable and judicially enforceable as it more fully stated later in *General Committee of Adjustment v. Missouri-Kansas R. Co., infra.*

The jurisdiction of courts with respect to granting injunctions in Railway Labor Act disputes became subject to the Norris-LaGuardia Act of March 23, 1932, c. 90, §§ 4 and 7, 47 Stat. 70, 29 USC 104, 107 (App. A-2-4). While Section 4 of that Act withdrew the general jurisdiction of courts to issue anti-strike injunctions in labor disputes, Section 7 of the Act authorized such an injunction in a case in which ". . . unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained . . ."

In *Chicago, Rock Island & Pacific R. Co. v. Switchmen's Union of North America*, 292 F. 2d 61 (2d Cir. 1961); *cert. den.* 370 U. S. 936 (1962), discussed in detail *infra*, the court questioned whether a violation of Section 2, First of the Railway Labor Act could constitute an "unlawful act" within the meaning of Section 7 of the Norris-LaGuardia Act as a basis for granting an anti-strike injunction.

The Railway Labor Act of 1926, as amended on June 21, 1934, c. 691, § 2, First, Third, Fourth, Ninth, 48 Stat. 1185, 45 USC 152, First, Third, Fourth, Ninth (App. A-4-7) was re-enacted in substantially the same words as Section 301 of the Transportation Act of 1920 as was Section 2, First of the 1926 Act. Section 2, Third was amended and Section 2, Fourth (45 USC 152, Fourth) was added to more plainly prohibit company dominated unions and Section 2, Ninth was added to provide for the National Mediation Board to determine what employees constitute a craft or class and to determine whether the craft desires a representative for the purposes of the Act and if so the representative selected by the majority of the craft and to require the Railroad to recognize and deal with such representative.

The first case considered by this Court involving the Norris-LaGuardia Act and the 1934 amendments of the

Railway Labor Act was *Virginian Railway Co. v. System Federation No. 40*, 300 U. S. 515 (1937).

In that case the Railway had engaged in collective bargaining and entered into a collective agreement with a company union, the "Mechanical Department Association of the Virginian Railway" as the representative of its shop craft employees who theretofore had been represented by Federation No. 40, an affiliate of the American Federation of Labor.

In pursuance of Section 2, Ninth, of the Railway Labor Act, the National Mediation Board conducted an election by the shopcraft employees and certified the Federation as the representative of the employees in certain crafts, while refusing to meet with the Federation and maintaining its agreement with the "Mechanical Department Association". The Railway established and furthered the efforts of another company union, the "Independent Shop Crafts Association of the Virginian Railway" to become the representative of its shop craft employees.

The Federation sued for an injunction to require the Railway to "treat with" it as provided by Section 2, Ninth of the Act and to prohibit it from interfering, in violation of Section 2, Third and Fourth of the amended Act, with the right of the employees to organize, designate and choose a representative and bargain collectively through their chosen representative. The District Court issued an injunction prohibiting the Railway from interfering with its employees' selection of a representative by further fostering, encouraging, promoting or dealing with either of the Associations or any other organization and, in the words of Section 2, Ninth, required the Railway to recognize and "treat with" the Federation and, in the words of Section 2, First, to exert and make every reasonable effort to make and maintain an agreement with the Federation.

The Railway contended that the requirement of the injunction for it to "treat with" the Federation and to "exert every reasonable effort to make and maintain agreements" with the Federation was without legal sanction because the same requirement was stated in the same words in Section 301 of the Transportation Act of 1920 and was held to be without legal sanction in *Pennsylvania R. Co., System & Allied Lines Federation No. 90 v. Pennsylvania R. Co., supra.* This Court rejected that argument (300 U. S. 544-545) saying:

> ". . . But these words no longer stand alone and unaided by mandatory provision of the statute as they did when first enacted. The amendment of the Railway Labor Act added new provisions in Section 2, Ninth which . . . commands that 'upon receipt of such certification [by the Mediation Board, of the representative of the employees] the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act [chapter].' It is, we think not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer and that its command, in a proper case, be enforced by the courts."

It is apparent that the "mandatory requirement" which this Court enforced was that of Section 2, Ninth, not Section 2, First, which as this Court stated later in *General Committee of Adjustment v. Missouri-Kansas R. Co., infra,* is not justiciable (320 U. S. 323 (1943), *infra*).

The Railway also argued that the requirement of the injunction for it to "treat with" the representative of the employees merely required the employer to meet the authorized representative of the employees only if and when it should elect to negotiate with such representative

but this Court said that the argument disregards the words of Section 2, Ninth and that although the Act does not compel agreement the "command to the employer" to take those preliminary steps without which no agreement could be reached and to "treat with" the authorized representative which, at least, requires the employer to meet and confer with the authorized representative of its employees, to make reasonable effort to compose differences, to enter into negotiation for the settlement of labor disputes such as is contemplated by Section 2, First (300 U. S. at 547).

The Railway also argued that since a court of equity could not compel agreement it should not enter an order to compel the preliminary steps to be taken. The Court also rejected that argument and held the injunction valid. However, the Court did not suggest that if the Railway meet with the Federation and no agreement resulted, there should be further judicial proceedings to determine whether the Railway had exerted every reasonable effort to make an agreement, as contemplated by Section 2, First of the Railway Labor Act and compel compliance therewith. Instead, this Court stated, 300 U. S. at 551-552:

> ". . . Moreover, the resources of the Railway Labor Act are not exhausted if negotiation fails in the first instance to result in agreement. If disputes concerning changes in rates of pay, rules, or working conditions, are 'not adjusted by the parties in conference', either party may invoke the mediation services of the Mediation Board, section 5, First (45 U. S. C. A., § 155, subd. 1), or the parties may agree to seek the benefits of the arbitration provision of section 7 (45 U. S. C. A., § 157). With the coercive influence of the company union ended, and in view of the interest of both parties in avoiding a strike, we cannot assume that negotiation, as required by the

decree, will not result in agreement, or lead to successful mediation or arbitration, or that the attempt to secure one or another through the relief which the district court gave is not worth the effort."

Thus, this Court considers that, if conference fails to produce agreement the next step should be mediation by the National Mediation Board, which this Court considers to be "the antithesis of justiciability" and litigation (*General Committee of Adjustment v. Missouri-Kansas R. Co.*, 320 U. S. 323, at 337, *infra*).[3]

The provisions of Section 5 of the Railway Labor Act as amended in 1934 (cf. Act of May 20, 1926 c. 347, § 5, 44 Stat. 580 (App. A-2), and Act of June 21, 1934, c. 691, § 5, 48 Stat. 1195 (App. A-7)), confirms that mediation, not litigation, is the remedy for the refusal or failure of conferences. Section 5, First (a) and (b) of the Act, now

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[3] In this connection the Court further stated that:

". . . the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability.

In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. . . . Courts should not rush in where Congress has not chosen to tread.

We are concerned solely with legal rights under this federal Act which are enforcible by courts. For unless such a right is found it is apparent that this is not a suit or proceeding 'arising under any law regulating commerce' over which the District Court had original jurisdiction. . . ."

45 USC 155, provide in part that "where conferences are refused" or where a dispute is "not adjusted by the parties in conference" either or both parties to the dispute may invoke the services of the National Mediation Board or the Board may, *sua sponte*, proffer its services.

Also, in connection with the *Virginian* case, *supra*, it should be noted that it was concerned with the jurisdiction of the Courts *prior* to conferences, negotiation, mediation and possibly an investigation and report by a Presidential Emergency Board and was not concerned with whether the Act provides judicial review of the conduct of the parties in exhausting the requirements of the Act *subsequent* thereto.

The decision of the Court of Appeals for the District of Columbia Circuit in *Brotherhood of Railroad Trainmen, et al. v. Akron & Barberton Belt R. Co., et al.*, 385 F. 2d 581 (D. C. C. A. 1967) is in accord, as will appear in more detail *infra*. The District Court in that case had stated that the negotiation contemplated by Section 2, First of the Railway Labor Act would be judicially enforced as a condition precedent to mediation. *See Akron & Barberton Belt R. Co. v. Brotherhood of Railroad Trainmen*, 254 F. Supp. 306, and the Order entered pursuant to that opinion at page 318, Vol. 2 of the Joint Appendix in *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, Nos. 20,229, 20,249 in the Court of Appeals for the D. C. Circuit filed in this Court in *Akron & Barberton Belt R. Co. v. Brotherhood of Railroad Trainmen*, No. 863, October Term, 1967, *cert. den.* 390 U. S. 923 and *Akron & Barberton Belt R. Co. v. Order of Railway Conductors*, 253 F. Supp. 538 from which petitioner quotes at pages 11-12 of the petition in this case. The Court of Appeals did not suggest judicial review of the conduct of the parties in conference and judicial enforcement of compliance with Section 2, First as a condition precedent to mediation.

Instead, the Court of Appeals ruled that upon the refusal of the railroads to confer the unions properly advanced the dispute to mediation, 385 F. 2d at 597.

Section 2, First was again considered by this Court in *General Committee of Adjustment v. Missouri Kansas-Texas R. Co.*, 320 U. S. 323 (1943). In that case the Court held the question whether the railroad was required by Section 2, First and Ninth of the Railway Labor Act to deal with the Brotherhood of Locomotive Engineers with respect to the use of firemen as engineers to the exclusion of the Brotherhood of Locomotive Firemen & Enginemen as the representative of the firemen who might be called to work as engineers, not to be justiciable under the Railway Labor Act. In so doing this Court limited the jurisdiction of Courts with respect to the justiciability of and enforcement of provisions of the Railway Labor Act. In so doing, the Court considered and explained its decision in the *Virginian* case, saying 320 U. S. at 333:

> ". . . [a]s we have already pointed out, § 2, Ninth, after providing for a certification by the National Mediation Board of the particular craft or class representative, states that 'the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act.' That command of § 2, Ninth, was enforced in the *Virginian R. Co.* case. But § 2, Second, like § 2, First [which provides that 'it shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise. . . .'], merely states the policy which those other provisions buttress with more particular commands . . ."

Thus, this Court made it plain that, in the *Virginian* case, it held only that the provisions of Section 2, Ninth, were judicially enforceable and did not hold that Section 2, First, which was incorporated in the injunction involved in that case was judicially enforceable.

The only other expression by this Court, upon which petitioner relies, is in a footnote in *Elgin, Joliet & Eastern R. Co., v. Burley*, 325 U. S. 711 (1945) at 721-722 (Ftn. 21). Petitioner's reliance on that statement of this Court is misplaced. The statement was made in rejecting an argument founded upon language in *Moore v. Illinois Central R. Co.*, 312 U. S. 630 at 635-636, that the entire scheme of the Railway Labor Act for the settlement of grievances, including a grievance for wrongful discharge, was "wholly conciliatory in character, involving no element of legal effectiveness, with the consequence that the parties are entirely free to accept or ignore the Board's decision [with respect to disputes submitted to it]. What this Court said in *Burley* was that parties to a dispute to the Railway Labor Act, whether a "major" or "minor" dispute as defined and delineated in *Burley* were subject to "a duty . . . to *negotiate* for . . . settlement [of the dispute]" (emphasis supplied) which was judicially enforceable (325 U. S. at 721, f. n. 12; 729, f. n. 26). That statement lends no support to petitioner's claim in this case, that Section 2, First of the Railway Labor Act confers jurisdiction upon courts to determine, upon evidence of the conduct of parties in negotiation and mediation whether a party made every reasonable effort to settle the dispute and, to permit or deny the exercise of self-help, depending upon such judicial determination by the Court. Also, in the *Burley* case, after outlining the requirements of the Railway Labor Act with respect to major disputes, as this Court did in *Missouri-Kansas-Texas, supra*, 320 U. S. at 327, in which it stated that those requirements were not justiciable (320 U. S. at

337, the Court also held in *Burley* (325 U. S. at 725), that the ". . . compulsions [of the Railway Labor Act] go only to insure that those proceedings are exhausted before resort can be had to self-help."

In considering the prior phase of this crew consist dispute in *Brotherhood of Locomotive Engineers, et al. v. Baltimore & Ohio R. Co.*, 327 U. S. 284 (1963), in which the union's complaint was based on an alleged violation by the Railroads of Section 2, First of the Railway Labor Act, this Court said at 327 U. S. 290: "The only question presented, therefore, is whether the record before us sustains the finding of both lower courts that the parties have exhausted the procedures provided by the Railway Labor Act for major disputes such as that involved here. . . .", and further 325 U. S. at 291, that:

> ". . . both parties, having exhausted all of the statutory procedures, are relegated to self-help in adjusting this dispute, subject only to the invocation of the provisions of § 10 providing for the creation of an Emergency Board. . . .".

This Court uniformly has held, as it did in the *Baltimore & Ohio* case, that after the parties have exhausted the statutory procedures of the Railway Labor Act with respect to major disputes, they are free to exercise self-help and, as the Court of Appeals for the Second Circuit said in *Pan American World Airways, Inc. v. Flight Engineers*, 306 F. 2d 840 (1962) at 846-847, *infra*, that after the procedures of the Railway Labor Act have been exhausted:

> ". . . the Act contemplates that the further progress toward the determination of the controversy will be left entirely to the interplay of economic forces without further governmental intervention . . ."

and that

". . . no injunction can issue under the Act against a strike which is undertaken after the . . . processes of the Act have been completed . . ."

Elgin, J. & E. Ry. Co. v. Burley, et al., 325 U. S. 711, 725 (1945); *Order of Railroad Telegraphers v. Chicago and North Western R. Co.*, 362 U. S. 330 (1960); *Brotherhood of Locomotive Engineers v. Baltimore & Ohio Railroad*, 372 U. S. 284, 290-91 (1963); *Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO v. Florida East Coast Railway Co.*, 384 U. S. 238, 243-44 (1966); *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369, 378-79 (1969).

II

There Is No Conflict of Decision

Petitioner cites cases decided in the District of Columbia, 2nd, 4th, 5th and 8th Circuits, by the Courts of Appeals for those Circuits and by District Courts in some of them as being in conflict with the decision of the Court below in this case.

While we are mindful that this Court, under its Rule 19(b), is concerned with conflict in decisions by Courts of Appeals on the same matter and slightly, if at all, with a conflict between a decision by a Court of Appeals and a District Court in the same or a different Circuit on the same matter, we shall nevertheless, consider all of the cases cited by petitioner since there is no conflict between the decision of the Court below in this case and the decision by any other Court of Appeals or by a District Court of the question decided by the Court below in the same circumstances of this case.

A

Petitioner relies principally upon a claim that a conflict exists between the decision of the Court below in this case and a decision by the Court of Appeals for the 4th Circuit in *Piedmont Aviation, Inc. v. Air Line Pilots Ass'n.*, 416 F. 2d 633 (1969), *cert. denied,* 90 S. Ct. 924 (1970); hence we will first consider that case and the others decided in the 4th Circuit upon which Petitioner relies.

The decision by the Court below should not be considered to be in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Piedmont Aviation, Inc. v. Air Line Pilots Ass'n., Inc.*, 416 F. 2d 633, on the same matter, notwithstanding the Court below stated (422 F. 2d at 988), that "[t]he Court [of Appeals for the 4th Circuit] in a holding [in the Piedmont case] opposite to our conclusions, found . . . and thus held § 2, First, to be justiciable" and that "[W]e cannot agree with the Fourth Circuit decision" because, as will appear *infra,* the use by the Court below of the words "holding", "held" and "decision" were an obvious inadvertent misinterpretation of the *Piedmont* case.

The only *decision* which the Court of Appeals for the Fourth Circuit made in *Piedmont* was that the preliminary injunction against a strike by the pilots, which was conditioned upon *Piedmont* maintaining the *status quo ante,* should be continued pending further consideration of the case by the District Court and that the first question which the District Court should decide was with respect to its jurisdiction to decide the case on its merits by determining whether the dispute between Piedmont and the pilots was a minor dispute which the Court should not decide (416 F. 2d at 639-640).

That part of the opinion in *Piedmont* with which the Court below disagreed in this case—(422 F. 2d at 988;

App. A, p. 19a) (Ptn. 9)—that Section 2, First of the Railway Labor Act was justiciable subsequent to exhaustion of the requirements of the Railway Labor Act for conference and mediation—was stated by the Court of Appeals for the Fourth Circuit to have been upon the *assumption* that the controversy was a major dispute as to which there had been "no judicial inquiry of its aptness" (416 F. 2d at 639).

If the dispute is determined to be a minor dispute, the courts in the Fourth Circuit will not ever decide, in the *Piedmont* case, the question which was decided in this case by the Court below and what the Fourth Circuit Court of Appeals said in *Piedmont* which conflicts with this decision by the Court below in this case, will forever remain what it is now—*obiter dictum* and not a *decision.*

It may well be that if the dispute in *Piedmont* is determined to be a "major dispute", the Courts in the 4th Circuit which will further consider the *Piedmont* case may make the same decision as was made by the Courts below in this case.

To give effect to the dictum of the Court of Appeals in *Piedmont,* which is the position urged by petitioner would, in effect, incorporate the Labor Management Relations Act into the Railway Labor Act, notwithstanding the Labor Management Relations Act expressly does not apply to employers and employees subject to the Railway Labor Act, 29 USC 152(2), (3) and this Court has stated in *Chicago River & Indiana R. Co. v. Brotherhood of Railroad Trainmen,* 353 U. S. 30 (1957) at 32 fn. 2 that:

> "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act, . . ."

and more recently in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U. S. 369, 384 (1969) that:

> ". . . It should be emphasized from the outset that the National Labor Relations Act cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes. . . ."

and, unlike the Railway Labor Act, the Labor Management Relations Act does not provide for compulsory mediation in such circumstances and, under the Labor Management Relations Act, good faith negotiation is the first and last requirement of that Act, *United Industrial Workers, etc. v. Board of Trustees of Galveston Wharves*, 400 F. 2d 320 (5th Cir. 1968) at 329-330, *National Airlines, Inc. v. International Ass'n. of Machinists*, 416 F. 2d 998 (5th Cir. 1969) at 1004.

The dictum in the *Piedmont* case was that the District Court should, if it found the dispute to be a "major" dispute conduct "a trial on the merits" of the employer's claim that the union had violated Section 2, First of the Railway Labor Act in negotiating and mediating and determine the employer's claim upon evidence of "the details of each bargaining session" and, if "the trial discloses a lack of good faith bargaining, should issue an injunction against a strike by the union," but that the injunction "must not be a permanent bar to the strike" but should provide for "its dissolution whether or not agreement is reached, when the union complies with the Act" because "[t]he union—no less than the company—has the right to resort to self-help when proceedings under the Act have been exhausted" (416 F. 2d at 638).

The dictum of the Court of Appeals in *Piedmont* would, in effect, equate Section 2, First, of the Railway

Labor Act with Section 8(a)(5), Section 8(b)(3) and Section 8(d) of the Labor Management Relations Act of June 23, 1947, c. 120, 61 Stat. 140 (App. A-8-10) which provide that it shall be an "unfair labor practice" for an employer or a labor organization not to 'confer in good faith' with respect to wages, hours, and other terms of employment" in "the negotiation of an agreement" so that Section 2, First of the Railway Labor Act is justiciable and judicially enforceable by the Courts, like Sections 8(a)(5), (b)(3) and (d) of the Labor Management Relations Act, upon the complaint made by an employer under Section 10(b) of that Act (App. A-11) are justiciable, initially by the National Labor Relations Board and thereafter by the Courts in an action by the National Labor Relations Board to enjoin a strike by a union over a dispute with respect to which the National Labor Relations Board has determined by the employer's complaint and upon evidence of the conduct of the union that there is probable cause to believe or that the union has been guilty of such unfair labor practice as provided in Section 10 (j), (k) and (l) of the Labor Management Relations Act (App. A-12-14) so that unions representing employees under the Railway Labor Act should be enjoined from engaging in a strike over such dispute until it shall have purged itself of such unfair labor practice by engaging in re-negotiation, or in re-mediation by the National Mediation Board or, in cases in which an investigation has been made of the dispute by a Presidential Emergency Board by re-participating in a re-investigation by a re-established Presidential Emergency Board to an extent that it may, in the judgment of the Court, then be entitled to exercise the right of self-help and strike, which is implicit in the Railway Labor Act after the requirements of that Act have been exhausted, as most recently stated in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Company,* 394 U. S. 369, 378 (1969), and which is preserved by statute to

employees subject to the Labor Management Relations Act by 29 USC 163 after the requirements of that Act have been met.

Norfolk & P. B. R. R. v. Brotherhood of Railroad Trainmen, 248 F. 2d 34 (4th Cir. 1957) (Ptn. 9-10), involved a minor dispute which the railroad had submitted to the National Railroad Adjustment Board and the Court held that the anti-strike injunction properly had been issued under *Chicago River & Indiana R. Co. v. Brotherhood of Railroad Trainmen,* 353 U. S. 30 (248 F. 2d at 40, 46). The statement of the Court (248 F. 2d at 45, f. n. 6), upon which Petitioner relies in this case, that the negotiation required by the Railway Labor Act is the "good faith" bargaining required by the Labor Management Relations Act, was pure *obiter,* having been made with respect to bargaining which might occur later if the union sought an agreement to remedy any adverse effects which might result from the change of the on and off duty point if the National Railroad Adjustment Board should find the railroad had the right to make the change under the existing agreement or that the agreement did not prohibit the change.

Brotherhood of Railway & Steamship Clerks, etc. v. Atlantic Coast Line R. Co., 201 F. 2d 36 (4th Cir. 1953), *cert. den.* 345 U. S. 992 (1953) (Ptn. 9, 10) should be considered with *Rose v. Brotherhood of Ry. & Steamship Clerks,* 181 F. 2d 944 (4th Cir. 1950), *cert. den.* 340 U. S. 851 (1950), which was an appeal from the decision in *Brotherhood of Ry. & Steamship Clerks v. Atlantic Coast Line R. Co.,* 85 F. Supp. 115 (D. C. 1950). The National Mediation Board had certified the Brotherhood to be the representative of the clerical employees of the railroad including some 850 employees who theretofore had not been subject to the collective agreement and who in the *Rose* case, unsuccessfully sought to continue to be excluded.

After the certification by the National Mediation Board, the Brotherhood submitted a proposal for an agreement to be applicable to employees theretofore excluded. The Railroad listened, made no objection to the proposal but declined to agree to it or submit any counter-proposal. The National Mediation Board was unable to bring about an agreement, proposed arbitration which the railroad refused and then terminated its jurisdiction. Instead of calling a strike, the Brotherhood instituted an action for a mandatory injunction to compel the railroad to negotiate as required by Section 2, Ninth of the Railway Labor Act. The District Court dismissed the action and the Court of Appeals reversed with directions to the District Court to issue an injunction requiring the Railroad to bargain in good faith with the Brotherhood with respect to rates of pay, rules, and working conditions of the entire craft of its clerical employees, including the employees with respect to whom the railroad theretofore had refused to bargain, 201 F. 2d at 41. The question decided by the Court below in this case was not raised or decided.

B

The decision of the Court below is not in conflict with any decision of the Courts of the District of Columbia Circuit.

Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co., 385 F. 2d 581 (D. C. Cir. 1967), *cert. den.* 390 U. S. 923 (1968) (Ptn. 12) was not concerned with the question whether Section 2, First of the Railway Labor Act is justiciable *after exhaustion* of the requirements of the Act for conference and mediation; it arose prior to and was concerned with the future exhaustion of such procedures.

Although *Akron & Barberton Belt* did not present and the Court did not decide the question decided by the Court

below in this case, we believe we should, nevertheless, comment upon it because petitioner's treatment of it is incorrect and misleading.

In that case the Court decided appeals from many decisions of the District Court (385 F. 2d at 592), including specifically the decisions in *Akron & Barberton Belt R. Co. v. Brotherhood of Railroad Trainmen,* 250 F. Supp. 691; 252 F. Supp. 207 and 254 F. Supp. 306 (385 F. 2d at 599, f. n. 36), and *Akron & Barberton Belt R. Co. v. Order of Railway Conductors,* 253 F. Supp. 538 (385 F. 2d at 598, f. n. 32 and at 614).

Petitioner quotes from the opinion of the District Court in *Akron & Barberton Belt R. Co. v. Order of Railway Conductors,* 253 F. Supp. 538 and incorrectly states (Ptn. 12) that the Court of Appeals affirmed the quoted statement.

The Conductors' union served a notice under Section 6 of the Railway Labor Act on March 23, 1965, more than nine months before the Award of Arbitration Board 282 was to expire, proposing an agreement to be effective thirty days thereafter to provide for a minimum crew of a conductor and two trainmen (385 F. 2d at 598).

Thereafter, in June and July, 1965, the Brotherhood of Railroad Trainmen served similar notices proposing an agreement to become effective on January 25, 1966, the day on which the Award was to expire, providing for a minimum crew of a conductor and two trainmen in road service and a foreman and two helpers in yard service.

In the *Brotherhood of Railroad Trainmen* case, on March 3, 1966, the District Court ruled that the Trainmen's notices were not effective prior to, but did become effective upon the expiration of the Award on January 25, 1966 and issued an injunction requiring the parties to

maintain the status quo while they pursued the various steps of negotiation, mediation, etc., provided by the Railway Labor Act for effecting changes in the changes which had been made under the Award (250 F. Supp. 691 at 695-698 and 252 F. Supp. 207 (D. D. C., March 28, 1966).

On April 9, 1966 the District Court made the same ruling with respect to effectiveness of the notice served by the conductors and noted that such conferences as there had been with respect to the notice did not meet the negotiation requirements quoted by petitioner (Ptn. 11-12) which the District Court ruled would have to be met *after* the conductors' notice became effective and before mediation although the National Mediation Board had then taken jurisdiction of the dispute.

On May 9, 1966 the railroads filed a motion in the *Trainmen's* case for an order restraining the Trainmen from participating in mediation being conducted by the National Mediation Board with respect to the crew consist dispute between the trainmen and the Atlantic Coast Line R. Co., the Baltimore & Ohio R. Co., the Missouri Pacific R. Co., and the Louisville & Nashville R. Co., arising from Section 6 notices served by and upon the union and those railroads prior to January 26, 1966, on the ground that since such date there had not been the conferences required by Section 2, First and Section 6 of the Railway Labor Act with respect thereto (Vol. II, pp. 185-191, Joint Appendix, filed in Nos. 20,225 and 20,246 in the U. S. Court of Appeals for the District of Columbia Circuit in *Brotherhood of Railroad Trainmen v. Akron & Barberton Belt R. Co.*, and in this Court in *Akron & Barberton Belt R. Co. et al. v. Brotherhood of Railroad Trainmen et al.*, No. 863, October Term, 1967). The District Court ruled on that motion on May 19, 1966, that full-fledged conferences with respect to the merits of the trainmen's dispute must be held subsequent to that time

to fulfill the requirements of the Railway Labor Act but declined to issue any order interfering with proceedings of the National Mediation Board (254 F. Supp. 306) and entered an Order to that effect (Vol. II, p. 318, Joint Appendix, *supra*).

In the Conductors' case the Court of Appeals held the Conductors' notice was invalid and the railroads were not required to bargain with respect to it but did not comment upon the statement by the District Court quoted by petitioner (385 F. 2d at 598) and held the injunction issued by the District Court against a strike by the conductors was not precluded by the Norris-LaGuardia Act (385 F. 2d at 614).

In contrast to that disposition of the Conductors' case, the Court of Appeals, in the *Trainmen* case, held the notices served by the Trainmen were valid when served, required the railroads to negotiate and that the railroads, by refusing to negotiate, had violated their duties under the Act, had forsaken their right to insist upon conferences, and the dispute properly had been advanced to mediation and, also, that the anti-strike injunction against the Trainmen was issued in violation of the Norris-LaGuardia Act (385 F. 2d at 597, 599 and 613).

Atlantic Coast Line R. Co. et al. v. Brotherhood of Railroad Trainmen, 262 F. Supp. 177 (D. D. C. 1966), *rev'd.* 383 F. 2d 225 (D. C. C. 1967), *cert. den.* 389 U. S. 1047 (1968) (Ptn. 13), as distinguished from the *Akron & Barberton Belt* case, did arise after the National Mediation Board terminated its jurisdiction of the crew consist dispute between the Trainmen and the Atlantic Coast Line R. Co., the Boston & Maine R. Co., and the Des Moines Union R. Co. In the *Atlantic Coast Line* case, the railroads sued for a declaratory judgment that the requirements of the Railway Labor Act had not been ex-

hausted by the union because it had not bargained in good faith as required by Section 2, First and Second of the Railway Labor Act as demonstrated by (1) premature service of its notices in June and July 1965, prior to the expiration of Arbitration Board 282; (2) making and adamant, by insisting upon proposals which were not in accordance with the Award of Arbitration Board 282 and which drastically differed from rules found to be justified in proceedings under such award without attempting to justify the proposed changes; and (3) by not agreeing to negotiation upon a national agreement contrary to the long established practice (pp. 2-34, Joint Appendix filed in *Atlantic Coast Line et al. v. Brotherhood of Railroad Trainmen*, No. 20,178 in the United States Court of Appeals for the District of Columbia Circuit and in *Atlantic Coast Line et al. v. Brotherhood of Railroad Trainmen*, filed in this Court in No. 883, October Term, 1967).

Without ruling on the Union's objection to the jurisdiction of the Court, as did the Courts below in this case, although the jurisdiction of the Court was raised in the *Atlantic Coast Line* case (pp. 34, 35, 41, Joint Appendix, *supra*), the District Court conducted a trial on evidence of prior national handling of disputes and the conduct of the parties in negotiation and mediation with respect to each of the disputes between the union and each of the three railroads.

The District Court found the union had bargained in good faith with the three railroads over the crew consist issue but had violated the Railway Labor Act by not agreeing to national handling. *Atlantic Coast Line et al. v. Brotherhood of Railroad Trainmen*, 262 F. Supp. 177 (D. D. C. 1967) at 183-185.

The Union's appeal in *Atlantic Coast Line* was concerned only with the question of whether the union vio-

lated any duty under the Railway Labor Act by not agreeing to national handling as demanded by the railroads. The Court of Appeals reversed the decision of the District Court and held the union did not violate the Railway Labor Act by not agreeing to national handling of the crew consist dispute (383 F. 2d 225). This Court denied certiorari, 389 U. S. 1047.

Thus, the Court of Appeals for the District of Columbia did not *decide* in either *Akron & Barberton Belt R. Co.*, or *Atlantic Coast Line*, the question decided by the Court below in this case.

The two other decisions by the Court of Appeals for the District of Columbia Circuit, to which petitioner refers are *Brotherhood of Railway Clerks v. Railroad Retirement Board*, 239 F. 2d 37, in which Mr. Chief Justice (then Judge) Burger, wrote the opinion (Ptn. 12), and *Southern Railway v. Brotherhood of Locomotive Firemen & Enginemen*, 217 F. Supp. 58, 223 F. Supp. 249, 384 F. 2d 323 (1967) (Ptn. 13).

The question decided by the Court below in this case was not involved in nor decided in either of those cases. The questions in the *Retirement Board* case were whether the conduct of certain employees, in not working, amounted to a strike in violation of the Railway Labor Act and whether, if it did, the employees were entitled to unemployment insurance payments under the Railroad Unemployment Insurance Act.

Southern Railway Co. v. Brotherhood of Locomotive Firemen & Enginemen, 217 F. Supp. 58 (D. D. C. 1963), and 223 F. Supp. 249 (D. D. C. 1963), and 384 F. 2d 323 (D. C. Cir. 1967) (Ptn. p. 13), involved a question concerning whether, under the existing collective agreement, the Southern had the right to discontinue employing firemen on diesel engines which dispute was pending before

the National Railroad Adjustment Board and, also, a dispute arising from notices served by each party for agreements regarding the employment of firemen. The Court of Appeals affirmed an injunction requiring the Southern to restore and maintain the *status quo* existing prior to the dispute pending a determination by the National Railroad Adjustment Board whether the Southern had the right under the agreement to cease employing firemen, or if not, until it should acquire that right by exhausting the requirements of the Railway Labor Act with respect to its Section 6 notice. It did not remotely involve the question decided in this case by the Court below.

In *Chicago, Burlington & Quincy R. Co. v. Railway Employees Dept.*, 301 F. Supp. 603 (D. D. C., 1969) (Ptn. 13) the District Court held the Union was required to bargain with all the railroads with which it had made the agreement it desired to change, rather than with only one of those railroads and stated that it reached no conclusion on the issue of good faith bargaining by the union before or during mediation. *International Association of Machinists v. National Railway Labor Conference*, 310 F. Supp. 905 (D. D. C., 1970) (Ptn. 13-14) was to the same effect.

Thus, it is apparent that none of the Courts in the District of Columbia have rendered any decision in conflict with the decision of the Court below in this case.

C

We turn now to petitioner's claim of a conflict of the decision of the Court below in this case with decisions by the Courts in the Second Circuit.

In *Chicago, R. I. & P. R. Co. v. Switchmen's Union of North America*, 292 F. 2d 61 (2d Cir., 1961) (Ptn. 14, fn. 10), an anti-strike injunction was sought on the ground

the union had violated Section 2, First of the Railway Labor Act in negotiation and mediation because its negotiators were not empowered to consummate an agreement because the Union's constitution required ratification by the members (*cf. Piedmont, supra*) and because of the conduct of the Union's representatives during the entire course of negotiation and mediation (292 F. 2d 61-62, 68). The District Court granted the injunction. The Court of Appeals reversed in an opinion by Judge Friendly on the ground the injunction was precluded by the Norris-LaGuardia Act (267 F. 2d at 71) and expressly did not decide the question decided in this case by the Court, saying (292 F. 2d at 67):

> ". . . Appellees argue with force that it is as much a violation of the Railway Labor Act to make only a token effort to comply with its prescribed processes as to strike without even the pretense; the problem is that issuing an injunction on such a ground inevitably involves the court in some consideration of the labor dispute as bearing on the good faith of the employee representatives—and this without the advance administrative screening provided under the National Labor Relations Act in 29 U. S. C. A., § 160 (a), (b), (h), (i), and (l) and §§ 176-180. *We find it unnecessary here either to affirm or to deny that an injunction against a strike may be issued on such a claim, . . .*" (emphasis supplied).

Pan American World Airways, Inc. v. Flight Engineers International Association, 306 F. 2d 840 (2d Cir., 1962) (Ptn. 14-15) involved two disputes. The requirements of the Railway Labor Act with respect to one had been exhausted but not with respect to the other. The District Court, ignoring the exhaustion of the requirements of the Act with respect to one of the disputes, granted a preliminary injunction against a strike by the Union on the

ground the Union had not made every reasonable effort to settle the dispute as contemplated by Section 2, First of the Railway Labor Act. The Court of Appeals reversed, saying, 306 F. 2d at 846:

> "We may assume that the compulsion of injunction is available against strikes during the period when the National Mediation Board is attempting to mediate the dispute, and during the existence of a Presidential Emergency Board, and for thirty days after the report of such a Board. . . .
>
> "When the cooling-off procedures of the Act, including the appointment and report of the Emergency Board, if resort is had to that procedure, are exhausted and the final thirty day period has elapsed it is quite clear that the Act contemplates that further progress toward the determination of the controversy will be left entirely to the interplay of economic forces without further governmental intervention. The parties are then free from all compulsion under the Act and may resort to 'self-help', e. g., the union may then strike. As the Supreme Court said in *Elgin, supra*, 'compulsions go only to insure that those procedures [i. e., the procedures of mediation] are exhausted before resort can be had to self-help.' . . .
>
> "It follows that no injunction can issue under the Act against a strike which is undertaken after the mediation processes of the Act have been completed and the time limit which is provided has elapsed. . . .
>
> "Not only is there no authority under the Act for enjoining a strike which is begun at such a time, but the express provisions of the Norris-La Guardia Act deprive the Federal courts of jurisdiction to issue an injunction. . . ."

Thus, what the Court said in *Pan American* with respect to the claim of Pan American that the Union had not

complied with the requirements of Section 2, First of the Railway Labor Act in the negotiations with respect to the unresolved crew consist dispute which had not even gone to mediation (306 F. 2d at 849) obviously was *obiter dictum*, and, even if it were not, did not involve the question decided by the Court below in this case.

The other cases decided by the Court of Appeals for the Second Circuit which petitioner considers in the text of its petition and which were decided subsequent to *Chicago, R. I. & P. R. Co.*, and *Pan American World Airways* are *Kennedy v. Long Island R. Co.*, 211 F. Supp. 478 (D. C. N. Y. 1962), 319 F. 2d 366 (1963); *Long Island R. Co. v. System Federation*, 368 F. 2d 50 (1966) and *Seaboard World Airlines, Inc. v. Transport Workers Union of America*, 62 CCH Lab. Cas. ¶ 10,759, 73 LRRM 2894 (2d Cir. 1970).

The *Kennedy* case, *supra*, was an action for damages allegedly sustained by the Brotherhood of Railroad Trainmen as a result of a strike which the Railroad resisted twenty-six days, because, the Union claims, the railroad, together with twenty-two other railroads, had insurance against losses due to strikes. The Union contended the Railroad, by having such insurance, per se, violated Section 2, First of the Railway Labor Act, since the insurance was destructive of the duty of the Railroad under Section 2, First of the Railway Labor Act.

In *Long Island R. Co. v. System Federation, supra*, the Court found that actions and omissions of employees directed by the Union amounted to a strike to force the Railroad to negotiate with the Union with respect to changes in the collective agreement which were subject to a moratorium agreement issued an anti-strike injunction because the requirements of the Railway Labor Act for accomplishing the desired change had not been commenced nor exhausted by the Union.

Seaboard World Airlines, Inc. v. Transport Workers Union of America, 73 LRRM 2148 (D. C. N. Y. 1969) modified and aff'd., 62 CCH Lab. Cas. ¶ 10,759, 73 LRRM 2894 (2d Cir. 1970), involved the legality of a perpetual moratorium provision in an existing collective agreement with respect to changes which Union desired to effect and for which it had served a Section 6 Notice. The Court of Appeals ruled the question of the legality of the permanent moratorium provision of the collective agreement should be resolved by the Courts, rather than by an arbitration board, that an anti-strike injunction pending the resolution of the question of the legality of the permanent moratorium provision was not prohibited was not prohibited by the Norris-La Guardia Act and could be continued conditioned upon Seaboard maintaining the *status quo* and affirmed the order of the District Court denying the Union's Motion to compel Seaboard to negotiate with respect to its Section 6 Notice, pending the resolution of the legality of the moratorium provision of the collective agreement.

Theree cases which were decided by District Courts in the Second Circuit upon which petitioner relies (Ptn. 15) were decided prior to the decision of *Chicago, Rock Island & Pacific R. Co. v. Switchmen's Union of North America, supra,* in which the Court of Appeals declined to state, *even as dictum,* whether a violation by a party to a major dispute of Section 2, First of the Railway Labor Act, would be such a violation of the Railway Labor Act as would permit an anti-strike injunction under the Norris-LaGuardia Act. They were *American Airlines, Inc. v. Air Line Pilots Ass'n. Inc.,* 169 F. Supp. 777 (D. C. N. Y. 1958), *Long Island Railroad Co. v. Brotherhood of Railroad Trainmen,* 185 F. Supp. 356 (D. C. N. Y. 1960) and *Pan American World Airways, Inc. v. Brotherhood of Ry. & Steamship Clerks,* 185 F. Supp. 350 (D. C. N. Y. 1960) in which the District Courts did, subsequent to exhaustion

of the requirements of the Railway Labor Act, conduct an evidentiary hearing on an alleged violation by the Union of Section 2, First of the Railway Labor Act, as a basis for an anti-strike injunction: After such hearing the Court denied a preliminary injunction in *American Airlines;* a temporary restraining order was issued in the other two cases. The question decided by the Court below in this case was not considered or decided in any of those cases; the District Courts apparently assuming the issue was justiciable and a violation of Section 2, First by a Union, if established could be the basis for an anti-strike injunction which the Court of Appeals for the Circuit questioned in the *Chicago, Rock Island & Pacific* case, *supra.*

The two cases which were decided by District Courts in the Second Circuit since *Chicago, Rock Island & Pacific R. Co.*, and *Pan American* (Ptn. 15), did not remotely involve the question decided by the Court below in this case.

In *KLM Royal Dutch Airlines v. Transport Workers Union of America,* 49 CCH Lab. Cas. ¶ 18,990, 56 LRRM 2205 (D. C. N. Y. 1964) a temporary restraining order was issued against a strike over a dispute with respect to which a Section 6 Notice apparently had been served or, if not, was contemplated, with respect to which there had been some negotiations but which had been terminated, so as to permit the invocation of the services of the National Mediation Board or for that Board to proffer its services.

In *Long Island Railroad Company v. Local Union 808, International Brotherhood of Teamsters,* 57 CCH Lab. Cas. ¶ 12,378; 67 LRRM 2463 (D. C. N. Y., 1967), the District Court issued a preliminary injunction against a strike by the Teamsters over a dispute which was then subject to the jurisdiction of the National Mediation Board.

D

We turn now to petitioner's claim of a conflict between the decision of the Court below in this case with decisions in cases in the Fifth Circuit (Ptn. 11 and 16). *Southern Railway v. Brotherhood of Locomotive Firemen & Enginemen*, 223 F. Supp. 296 (D. C. M. D. Ga. 1962), *aff'd on the basis of opinion below*, 324 F. 2d 503 (5th Cir. 1963) (Ptn. 11) was an action for declaratory judgment with respect to whether certain proposals made in a Section 6 notice served by the union were barred by a moratorium agreement and whether others were mandatorily bargainable. The case was dismissed as presenting no justiciable controversy (233 F. Supp. at 307-308). In quoting from the opinion in the case (Ptn. 11) petitioner omits the qualifying word "while" which establishes the *obiter dictum* nature of the part of the opinion relied upon by petitioner. The full quotation was (223 F. Supp. at 305):

> "*While* the courts have lent their aid to disputants by passing upon the validity *vel non* of a bargaining contract, . . . and *while* in a series of cases, where collective bargaining agents stepped outside their legal duties and violated the act which called them into being, such bargaining agents have been enjoined, . . . and *while* the courts have enjoined strikes in order to protect the jurisdiction of the National Railway Adjustment Board in minor disputes, . . . and have enjoined threatened and impending strikes in major disputes where good faith bargaining has not taken place in the manner and to the extent required by the act, . . . the courts have not generally treated as justiciable a controversy of the type and nature here presented. . . ." (*vel non* in text; other emphasis supplied.)

United Industrial Workers, etc. v. Galveston Wharves (Ptn. p. 16) has been considered by the Court of Appeals

for the Fifth Circuit several times, 351 F. 2d 183 (1965), 368 F. 2d 412 (1966) and 400 F. 2d 320 (1968). While a collective agreement, subject to the Railway Labor Act, was in effect and, after the Union had served a notice on the Trustees of the Galveston Wharves under Section 6 of the Railway Labor Act for changes in the agreement, the Trustees leased to a corporation not subject to the Railway Labor Act, an elevator at which its employees, who were subject to the Railway Labor Act, were employed and who would lose their jobs after the Trustees ceased to operate the elevator. The Trustee did so without serving a notice on the union under the provisions of Section 6. Prior to the effective date of the lease the union served a second notice on the Trustees, under Section 6 of the Railway Labor Act for an agreement covering the shut down, leasing or subcontracting of the elevator. The Trustees met with the Union but declined to negotiate for an agreement on the Union's second Section 6 notices on the ground it, theretofore, had executed the lease which was to become effective August 1, 1964. On July 31, 1964 the Union commenced a strike and sued for an injunction against the Trustees' consummating or operating under the lease and to require the trustees to maintain the *status quo* pending exhaustion of the requirements of the Railway Labor Act (351 F. 2d at 185-186, 400 F. 2d at 321-2). The District Court found the dispute to be a minor dispute and relegated the parties to the National Railroad Adjustment Board. The Court of Appeals found it was a major dispute and reversed because there had been no pretense on the part of the Trustees to comply with Section 6 of the Railway Labor Act—ordered the District Court to impose suitable relief and sanction for the protection of the displaced employees so that bargaining on the Union's Section 6 notices could proceed without requiring the Trustees to cancel the lease.

The subsequent decisions in the case were concerned with whether the District Court had, as ordered by the Court of Appeals, imposed suitable relief and sanctions for the displaced employees. Obviously the case does not involve the question decided by the Court below in this case.

In *National Airlines, Inc. v. International Ass'n of Machinists,* 416 F. 2d 998 (5th Cir. 1969) (Ptn. p. 17), the only question was whether an employer's wholesale discharge of employees represented by the Union was in violation of the *status quo* provisions of the Railway Labor Act or was justified by a "wildcat strike" which the union could not control, and obviously did not involve the question decided by the Courts below in this case.

E

The only case which arose in the Sixth Circuit to which petitioner refers (Ptn. 17, fn. 11) is *Capitol Airways, Inc. v. Air Line Pilots Assn.,* 223 F. Supp. 168 (M. D. Tenn. 1961). It involved a question of the validity of a collective agreement and not the question decided by the Court below in this case.

F

Lastly, we turn to the decision of the Court of Appeals for the Eighth Circuit which petitioner claims conflicts with the decision of the Court below in this case (Ptn. 17, f. n. 11).

In *Flight Engineers Int'l Ass'n. v. Trans World Airlines, Inc.,* 305 F. 2d 675 (8th Cir. 1962), on July 29, 1958 Trans World Airlines and the Union had made a comprehensive so-called "Basic" agreement covering rates of pay, rules and working conditions of flight engineers

which was to continue in effect until at least January 1, 1961 and on the same date, a separate "letter agreement" for flight engineers to participate in a training program to work on jet aircraft. The letter agreement provided that, after it had been in effect for one year, it was subject to change by the service of notice under Section 6 of the Railway Labor Act but in no event should it extend beyond January 1, 1961 when the basic agreement was to expire. On February 12, 1960 the Union served a notice under the provisions of Section 6 of the Railway Labor Act for changes in the letter agreement which included proposals TWA claimed were not mandatory subjects of collective bargaining. On February 16, 1960 TWA served a counter-notice on the Union. On October 26, 1960 the Union and on October 27, 1960, TWA, served notices under Section 6 of the Railway Labor Act for changes in the basic agreement. Thereafter, TWA filed a suit against a threatened strike by the Union, on the ground the union had not negotiated in good faith as required by the Railway Labor Act with respect to the notices relating to the basic agreement because the Union had insisted, as a condition to bargaining on changes in the basic agreement, upon an agreement with respect to proposed changes in the letter agreement which TWA claimed were not negotiable. On September 29, 1961 the District Court entered an injunction against a strike by the Union. The Union appealed and while the appeal was pending withdrew the proposals with respect to changes in the letter agreement to which TWA objected and moved for the dissolution of the injunction. The dispute with respect to changes in the basic agreement was progressed to mediation and the National Mediation Board terminated its services with respect thereto, after which the President established an emergency board. The Court of Appeals found the only justiciable issue had ceased to exist when both the letter agreement and basic agreement expired on January 1, 1961 and dismissed the appeal.

Northwest Air Lines, Inc. v. Air Line Pilots Ass'n, 185 F. Supp. 77 (D. C. Minn., 1960) (Ptn. 17, fn. 11) did not involve the question decided by the Court below in this case; the Court stated (185 F. Supp. 79) that although Northwest asserted in its pleadings that the union had not complied with Section 2, First, of the Railway Labor Act "it did not pursue such theory."

III

The Decision of the Court Below With Respect to the Role of the National Mediation Board Is Correct and Does Not Warrant Review

The decision of the Court below with respect to the role of the National Mediation Board is so clearly in accord with the established and accepted view of the function of that Board under the Railway Labor Act that it does not present a conflict with any decided case nor any important question of federal law which has not been, but should be, decided by this Court.

This Court has very recently reaffirmed that the Railway Labor Act is designed to accomplish the voluntary resolution of major disputes by requiring notice of intended change, providing for conference and negotiation, mediation and conciliation, voluntary arbitration and by focusing public attention upon the dispute by an investigation of a dispute and a report with respect thereto by a Presidential Emergency Board and withholding the exercise of self-help until after those facilities for resolving the dispute by agreement and which are purposely long and drawn out have been unsuccessfully used. *Detroit & Toledo Shore Line R. Co. v. United Transportation Union*, 396 U. S. 142, 90 S. Ct. 294 (1969) at 298-301 and cases there cited.

Nowhere does the Act expressly provide for judicial review of the conduct of parties in conference, mediation or in an investigation by a Presidential Emergency Board. Nor does the text of the Act provide for the exercise of self-help to be dependent upon the result of a judicial determination, after an evidentiary review of the conduct of parties in conferences, mediation or in an investigation by an Emergency Board of whether the parties complied with Section 2, First, such as is provided for by the Labor Management Relations Act, which, as heretofore shown herein, does not provide for compulsory mediation but is concerned solely with the unfair labor practice of refusal to negotiate in good faith; and negotiation in good faith as the first and last step required of the parties by that Act as a condition to the exercise of self-help.

Section 5, First of the Railway Labor Act, 45 USC 155, First of the Act, mandatorily provides that the National Mediation Board "shall promptly put itself in communication with the parties" to a dispute if neither party has requested the services of the Board, as each is authorized to do, in cases "where conference with respect to the dispute has been refused" by a party or the dispute "was not adjusted in conferences" between them.

Section 5, First, also mandatorily provides that the National Mediation Board "use its best efforts", by mediation to bring the parties to agreement and if those efforts fail to "bring about an amicable settlement" also to "use its best efforts" "to induce the parties to submit their controversy to arbitration".

The Board is also empowered by Section 10 of the Act, 45 USC 160, to notify the President of any dispute which has not been adjusted or submitted to arbitration as a

result of the efforts of the National Mediation Board in order that the President may determine whether to establish an Emergency Board to investigate the dispute and make a report with respect thereto which may include an investigation of the conduct of the parties and a report with respect thereto.

The Annual Reports of the National Mediation Board establish that the Board is well aware of the *status quo* provisions of the Railway Labor Act and of the duty of each party under Section 2, First of the Act, *National Mediation Board*, Thirty-Fifth Annual Report (1969), pp. 3-16, 36-40.

The necessity for the National Mediation Board to make decisions is implicit in the discharge of its duties, not the least of which decisions is whether the parties to a dispute have fulfilled their Section 2, First duty and should be remitted to self-help, subject to an investigation of the dispute and the conduct of the parties by an Emergency Board which the President may establish upon the recommendation of the Board under Section 10 of the Act.

The decisions of the National Mediation Board that the requirements of the Railway Labor Act have been exhausted and that the parties should be remitted to self-help, subject only to the possibility of an investigation and report by a Presidential Emergency Board, was given in this case by advising the parties that:

> "It is the judgment of our Board that all practical methods provided in the Railway Labor Act for our adjusting the dispute have been exhausted, without effecting a settlement.
>
> "In these circumstances, notice is hereby served in behalf of the Board that its services (except as provided in Section 5, Third, and in Section 10 of the

law) have this day been terminated under the provisions of the Railway Labor Act.

. . .

"By order of the National Mediation Board.

/s/ Thomas A. Tracy
Thomas A. Tracy
Executive Secretary." (Def. Ex. 7, Tr. 433)

which is the usual manner in which the National Mediation Board expresses its final decision terminating its jurisdiction. (*National Mediation Board*, 35th Annual Report, June 30, 1969, pp. 6-7.)

The National Mediation Board is also required by Section 2, Ninth, of the Railway Labor Act to make decisions as to which employees constitute a craft or class for the purposes of electing a representative of the craft or class and to determine what individual organization has been designated by a majority of the employees of such craft or class to be the representative of all the employees. Those decisions of the National Mediation Board are evidenced only by the certificate which it issues and are not subject to judicial review under *Switchmen's Union of North America v. National Mediation Board*, 320 U. S. 297 (1943), in which this Court said, at 303-4:

> "The fact that the certificate of the Mediation Board is conclusive is of course no ground for judicial review. . . . Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved. . . . We need not determine the full reach of that rule. . . .
>
> But its application here is most appropriate by reason of the pattern of this Act.

> While the Mediation Board is given specified powers in the conduct of elections, there is no requirement as to hearings. And there is no express grant of subpoena power. The Mediation Board makes no 'order.' And its only ultimate finding of fact is the certificate. . . . The function of the Board under §2, Ninth is more the function of a referee. To this decision of the referee Congress has added a command enforcible by judicial decree. . . ."

Unlike the judicially enforceable command of Section 2, Ninth, as heretofore shown by the decisions cited under Point I, *supra*, the Railway Labor Act does not contemplate judicial enforcement of Section 2, First after the National Mediation Board has terminated its jurisdiction of a dispute but, instead, contemplates no further governmental compulsion and relegates the parties to self-help, subject only to postponement of the exercise of self-help if a Presidential Emergency Board is established.

The text of the Railway Labor Act does not provide for judicial review of decisions of the National Mediation Board that all of the requirements of the Act for resolving the dispute just as it does not provide for judicial review of decisions of the National Mediation Board under Section 2, Ninth of the Act with respect to what employees constitute a craft or class and the representative designated by a majority thereof which decision is expressed only by a certificate of the Board given to the parties.

The decision of the National Mediation Board with respect to the exhaustion of the requirements of the Act, for which the Act does not provide judicial review, and which is given the parties by letter, should be given the same finality and not be subject to judicial review for the same reason that decisions of the Board under Section 2, Ninth were determined to be final and not subject to judicial review in the *Switchmen's Union case, supra.*

CONCLUSION

For the foregoing reasons the writ of certiorari should be denied.

Respectfully submitted

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July 27, 1970

APPENDIX A

TRANSPORTATION ACT OF 1920, ch. 91, Tit. III, 41 Stat. 469

Section 301

"It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute."

RAILWAY LABOR ACT OF 1926, ch. 347, 44 Stat. 577

Section 2, First (now 45 U. S. C. 152, First)

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Second

"All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all

APPENDIX

CONCLUSION

For the foregoing reasons the writ of certiorari should be denied.

Respectfully submitted

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July 27, 1979

APPENDIX A

TRANSPORTATION ACT OF 1920, ch. 91, Tit. III, 41 Stat. 456

Section 301

"It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute."

RAILWAY LABOR ACT OF 1926, ch. 347, 44 Stat. 577

Section 2, First (now 45 U. S. C. 152, First)

"It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 2, Second

"All disputes between a carrier and its employees shall be considered, and, if possible, decided, with all

expedition, in conference between representatives designated and authorized so to confer, respectively, by the carriers and by the employees thereof interested in the dispute."

Section 2, Third

"Representatives, for the purposes of this Act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other."

Section 5

"First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Board of Mediation created by this Act, or the Board of Mediation may proffer its services, in any of the following cases:

(a) A dispute arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions not adjusted by the parties in conference and not decided by the appropriate adjustment board;

(b) A dispute which is not settled in conference between the parties, in respect to changes in rates of pay, rules, or working conditions; . . ."

NORRIS-LA GUARDIA ACT, 29 U. S. C.

Section 104

"No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or

growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title."

Section 107

"No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection. . . ."

RAILWAY LABOR ACT OF 1934, ch. 691, 48 Stat. 1186, 45 U. S. C. 152

Section 2, Second

"All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible,

decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

Section 2, Third

"Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Section 2, Fourth

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any

dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2, Ninth

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the pur-

poses herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Section 5

"Sec. 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

"(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

"(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

"The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time. . . ."

LABOR MANAGEMENT RELATIONS ACT OF 1947, ch. 120, Stat. 136, Amending the Labor Management Relations Act of 1935, 49 Stat. 449, now 29 U. S. C.

Section 152 (2)

"The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly

owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."

Section 152(3)

"The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined."

Section 158 (a) (5)

"It shall be an unfair labor practice for an employer— . . .

to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

Section 158 (b) (3)

"It shall be an unfair labor practice for a labor organization or its agents— . . .

to refuse to bargain collectively with an employer provided it is the representative of his employees subject to the provisions of section 159(a) of this title;"

Section 158 (d)

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2)-(4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158-160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

on 160 (b)

'Whenever it is charged that any person has en-
ged in or is engaging in any such unfair labor prac-
e, the Board, or any agent or agency designated by
Board for such purposes, shall have power to issue
d cause to be served upon such person a complaint
ting the charges in that respect, and containing a no-
e of hearing before the Board or a member thereof, or
fore a designated agent or agency, at a place therein
ed, not less than five days after the serving of said
nplaint: *Provided,* That no complaint shall issue
ed upon any unfair labor practice occurring more
n six months prior to the filing of the charge with
Board and the service of a copy thereof upon the
son against whom such charge is made, unless the
son aggrieved thereby was prevented from filing
h charge by reason of service in the armed forces,
which event the six-month period shall be computed
m the day of his discharge. Any such complaint
y be amended by the member, agent, or agency
ducting the hearing or the Board in its discretion
any time prior to the issuance of an order based
reon. The person so complained of shall have the
ht to file an answer to the original or amended
nplaint and to appear in person or otherwise and
e testimony at the place and time fixed in the com-
int. In the discretion of the member, agent, or
ncy conducting the hearing or the Board, any other
son may be allowed to intervene in the said pro-
ding and to present testimony. Any such proceed-
shall, so far as practicable, be conducted in ac-
dance with the rules of evidence applicable in the
rict courts of the United States under the rules of
l procedure for the district courts of the United
tes, adopted by the Supreme Court of the United
tes pursuant to section 2072 of Title 28."

Section 160 (j)

"The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."

Section 160 (k)

"Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

Section 160 (l)

"(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158(e)

this title or section 158(b) of this title, or section (e) of this title or section 158(b) (7) of this title, preliminary investigation of such charge shall be de forthwith and given priority over all other cases ept cases of like character in the office where it is d or to which it is referred. If, after such inves- ation, the officer or regional attorney to whom the tter may be referred has reasonable cause to believe h charge is true and that a complaint should issue, shall, on behalf of the Board, petition any United tes district court within any district where the air labor practice in question has occurred, is al- ed to have occurred, or wherein such person resides transacts business, for appropriate injunctive relief nding the final adjudication of the Board with re- ct to such matter. Upon the filing of any such ition the district court shall have jurisdiction to nt such injunctive relief or temporary restraining er as it deems just and proper, notwithstanding other provision of law: *Provided further*, That temporary restraining order shall be issued with- notice unless a petition alleges that substantial irreparable injury to the charging party will be voidable and such temporary restraining order ll be effective for no longer than five days and l become void at the expiration of such period: *ovided further*, That such officer or regional at- ney shall not apply for any restraining order under tion 158(b) (7) of this title if a charge against employer under section 158(a) (2) of this title has n filed and after the preliminary investigation, he reasonable cause to believe that such charge is e and that a complaint should issue. Upon filing any such petition the courts shall cause notice reof to be served upon any person involved in the rge and such person, including the charging party,

shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 158(b) (4) (D) of this title."